IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

FIRST APPEAL NO.2103 OF 2005
WITH
CIVIL APPLICATION NO.4451 OF 2005

Madhukar V. Joshi. ...Appellant.
Vs.
Brahman Sabha Malad & Ors. ...
Respondents.

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Mr. Anil Singh h/f. Mr. C. A. Patel for the Appellant.
Mrs.Neelam Pawar for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 5, 2005.

P.C.:

Admit. With the consent of Counsel for the contesting parties, the appeal is taken up for hearing and final disposal. Perused the pleadings and the evidence with the assistance of Counsel appearing on behalf of the parties.

2. This First Appeal arises out of a judgment and order of the City Civil Court dated 9th September 2005 by which a suit instituted by the Appellant came to be dismissed.

3. The suit before the City Civil Court was for a declaration that the Respondents have no right to dispossess the Appellant or to disturb or interfere with the possession of the Appellant over an open space admeasuring 200 sq.ft. Situated at Sabha Kunj, Dadiseth Road, Malad (West), Mumbai-400 064. The Appellant is a monthly tenant of the First Respondent which is a public charitable trust registered under the Bombay Public Trusts Act, 1950. The tenanted premises are designated as Room No.1 comprising of two rooms and a veranda in front thereof. Laxmibai, the mother of the Appellant was the original tenant and after her life time, the Appellant came to be accepted as a tenant on 26th March 1975. There is a compulsory open space in the property belonging to the First Respondent, comprised within the compound. Between the compound on the perimeter of the property and the wall on the southern side of Room No.1, there is a compulsory open space. The Appellant put up an unauthorised construction enveloping this compulsory open space. The structure was demolished on 31st October 2001 and again on 4th September 2004 by the Mumbai Municipal Corporation after following due process of law. The suit before the City Civil Court was instituted on 15th September 2004

seeking a declaration to the effect that the First Respondent had no right to dispossess the Appellant or to disturb or interfere with his possession of the open space. A Written Statement was filed by the First Respondent denying the claim of the Appellant. There is no dispute about the factual position that the Appellant is a tenant in respect of Room No.1 but, it was the case of the Trust that the Appellant had no right, title or interest whatsoever in respect of the open space and that the unauthorised construction which was put up by the Appellant between the wall on the southern side and the compound wall on the perimeters was demolished on two occasions by the Municipal Corporation.

4. The Learned Trial Judge has elaborately considered the pleadings and the evidence. The impugned judgment notes that the Appellant had not made any specific averment in his pleading as to whether his alleged possession of the open space was founded on a claim as licensee or a tenant or by adverse possession or for that matter even as a trespasser. Even in the course of his affidavit in lieu of Examination-in-Chief, the Appellant has not spelt out clearly the foundation on which he laid claim in the open space. On the other hand, D.W. 1 who deposed on

behalf of the Trust specifically stated that the area in respect of which the suit came to be instituted was a compulsory open space and there was no question of the existence of any tenancy in respect thereof. The Appellant had instituted a suit before the Small Causes Court for a declaration of a tenancy. The suit was dismissed though it may be noted that according to the Appellant, this was on account of the fact that the area was an open space in respect of which the Small Causes Court would have no jurisdiction. The Learned Trial Judge held that in order to establish a claim for the grant of injunction, it was for the Appellant to establish the lawful nature of his alleged possession, particularly when it was against the true owner against whom an injunction was sought.

5. Having heard Counsel appearing on behalf of the contesting parties, I am of the view that the First Appeal is totally devoid of any merit. In para 1 of the plaint, the Appellant claimed that he is exclusively in use, occupation, possession and enjoyment "of a space Room 1" at Sabha Kunj. There is absolutely no evidence to establish either the creation of a tenancy in respect of the aforesaid space or in respect of the occupation of

the Appellant. The Appellant appears to have attempted to encroach upon the space which as the evidence of D.W. 1 would show is a part of the compulsory open space of the building. An unauthorised construction which was sought to be put up was demolished by the Municipal Corporation. The suit is an ingenious effort to aid the Appellant in establishing a right which he does not possess. The Appellant is a tenant of a room and by instituting a suit has sought to extend the area in his occupation by claiming some entitlement in respect of a compulsory open space. The Appellant has no such entitlement in respect of the open space. There is no merit in the First Appeal. The First Appeal is accordingly dismissed.

6. In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

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